

No. 14,853

United States Court of Appeals
For the Ninth Circuit

WILLIAM V. BOGGESE, as Protestant on
behalf of the City of Fairbanks,
Alaska, and THE CITY OF FAIRBANKS,
ALASKA,

Appellants,

VS.

BERRY CORPORATION, STEVE BOINICH and
UNITED STATES OF AMERICA,

Appellees.

On Appeal from the District Court of the United States for the
District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE
UNITED STATES OF AMERICA.

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STATEMENT OF JURISDICTION.

This appellee agrees with appellant's "Statement of Jurisdiction" so far as it describes the District Court's authority; however, this Court does not have jurisdiction to review the order appellant has appealed from.

The District Court below was acting in an administrative capacity—its order consented to the transfer of a territorial liquor license. The hearing on the

protest against said transfer was not a case or a legal controversy and the order did not amount to a final judgment under 28 U.S.C. 1291.

STATEMENT OF CASE.

Appellant's statement of the proceedings in the District Court fairly summarizes the actions of the Court in the hearing below.

ISSUES PRESENTED.

The major issue presented here is whether or not this Court has jurisdiction to review an administrative order of the district judge wherein he granted consent to transfer a liquor license.

If this Court has jurisdiction, the appellant's brief properly limits this appeal to one issue; *i.e.*, can the District Judge approve the transfer of a liquor license from one location to another in the Territory of Alaska?

ARGUMENT.

I.

**THERE CAN BE NO APPEAL FROM THE DISTRICT COURT'S
ORDER GRANTING CONSENT TO TRANSFER.**

This Court, by virtue of 28 U.S.C. 1291, has jurisdiction to review "final decisions" of the District Court for the Territory of Alaska. While it may be

true that a District Court in Alaska is exercising a judicial function when passing upon a protest against the issuance of a license (see, *In re Alaska Labor Trades Ass'n*, 10 Alaska 472, 484 (1945)), the appeal before this Court concerns only the consent of the District Court to transfer a license already issued.

The Alaska Legislature left the Court no discretion in the matter of transfers. Section 35-4-19, A.C.L.A., 1949, states clearly:

“* * * no licenses shall be transferred by the licensee to any other person except with the written consent of the court, *but authority for the same shall issue upon application thereto in writing.*”

How the granting of consent to transfer can rise to the level of a case or controversy is difficult to perceive. It is axiomatic that the jurisdiction of a federal Court must be limited to the “claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs.” (*Muskrat v. U. S.*, 219 U.S. 346, 349 (1910)). And in case, it is obvious that the only issue before the Court was whether the application for transfer was properly made. If it was, the Court was left no alternative but to consent to the application.

By imposing upon the District Court the task of reviewing, ordering the issuance of every liquor license in the Territory, and consenting to the transfers thereof, the Alaska Legislature has loaded a great

administrative burden upon the federal judges. It has also stripped a person aggrieved by the ruling of the district judge in a liquor application hearing of the usual remedies of injunction, etc. This very case is an example of the result of such an unwise decision: the liquor license in this case has been transferred; if the right to appeal exists, the remedy is entirely inadequate for the license by statute will expire at the end of one year (December 31, 1955). (35-4-19, A.C.L.A., 1949.) It has been said that the Alaska Legislature "probably has no authority to impose administrative duties upon the District Court or judge" (*In re Alaska Labor Trades Ass'n, supra*, p. 484) but such reasoning does not compel the conclusion that the Legislature did not in fact impose such a duty in this instance. Even if Congress had given the District Court of Alaska the duties set forth in the Territorial Liquor Law, it would not follow that the action of the Court is reviewable here. As a "Legislative Court" (see, *McAllister v. U. S.*, 141 U.S. 174 (1891)) the Alaska Court could be given additional administrative duties, but that does not necessarily mean that this Court, operating within the framework set up for constitutional Courts, can review a territorial administrative decision.

II.

IF THE DISTRICT COURT WAS EXERCISING A JUDICIAL FUNCTION WHEN IT CONSENTED TO THE TRANSFER, THE DISTRICT JUDGE DID NOT ABUSE HIS DISCRETION IN SO DOING.

Appellants rely upon the fact that many sections of the Alaska code refer to the "premises covered by any license", or the "premises covered by his license", to demonstrate that the Legislature intended the Court's power to consent to the transfer of a license ^{to be} ~~is~~ limited to a transfer from person to person. The license gives the licensee the privilege to sell liquor at a particular location. Upon receiving consent of the Court, the original licensee may transfer the license to another person and nothing in the liquor law requires that the transferee conduct his business upon the same premises as originally occupied by the licensee.

While procedure is set up for making application for a liquor license in the Territory, only an application in writing is required by law for consent to transfer a license once issued. Appellant contends that the Legislature intended transfers to be made only from person to person. Nothing in the law would require the conclusion that a transferee have all the personal qualifications as the original applicant—*nor does the law require the approval of the city council for a transfer from person to person.* Yet, conceding that the law authorizes a transfer from person to person, appellant argues that no transfer from place to place can be made because the city council should be permitted to pass upon the desirability of licensing the

premises. Obviously, appellant's circuitous reasoning is inherently destructive of its own position. All that the liquor statute requires of the original applicant as a showing for both "the integrity of the applicant and the desirability of the issuing of a license for the premises" is five references. (35-4-13, A.C.L.A., 1949, as amended.) The only function of the city council is to approve or disapprove *the original* application. If it fails to act, the city will lose its share of the license regardless of approval, disapproval or failure to act on the part of the city council.

Appellant also accuses the Court below of trying to fill a procedural vacuum because it referred the application for transfer to the Fairbanks City Council prior to granting its consent. There is no doubt that the Court below required the transferee to establish that he fulfilled all the requirements of an original applicant—including references attesting to desirability of licensing his premises—and referred the transfer to the Fairbanks City Council for its action. The Court was not compelled to do this, but in its discretion has demanded such a showing for the protection of the community. Whether the council refused to act because it had already received its portion of the fee for the license involved and wanted the transferee to pay for a new license is a matter of conjecture. Suffice it to say that it had approved the issuance of the license to the Berry Corporation. Its refusal to act upon the transfer did not prevent the Court from consenting to the transfer.

The Berry Corporation had prepaid its license fee for one year. The license had value at least equal to the prorated prepaid balance. Having approved the original license, there can be no question that the Fairbanks City Council consented to the existence of the license. The question is whether or not by its refusal to act upon the transfer the city council can destroy the value of the license to the original applicant or its successor in interest. This appellee submits that the opinion below speaks for itself on this issue.

CONCLUSION.

In conclusion, based on the argument set forth above, appellee submits that this Court should dismiss this appeal for the reason that it lacks jurisdiction to review the order appellant has appealed from. In the alternative, appellee requests this Court to affirm the opinion of the District Court below.

Dated, Fairbanks, Alaska,
December 7, 1955.

Respectfully submitted,

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Attorney for Appellee

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